(2)

No. 01-624

Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

IN THE

Supreme Court of the United States

CAROLYN ANN LAFAVRE, also known as Carolyn A. Howerter, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers who reside in Kansas,

Petitioners,

v.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; TIM SHALLENBURGER, as State Treasurer of Kansas; STEPHEN S. RICHARDS, as Secretary of Kansas Department of Revenue and as acting Director of Kansas Division of Taxation; DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue, and of Director and Division of Taxation of Kansas Department of Revenue, and as representative defendant of a class of employees and agents of Kansas and the Kansas Department of Revenue,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.8, petitioners wish to call the Court's attention to the intervening matter discussed below, which was not available when the instant petition was filed on October 10, 2001.

Petitioners continue their prayer that the writ of certiorari be granted, but suggest that the Court may instead wish to reverse the panel opinion below, and remand for reconsideration in light of (i) *Correctional Services Corporation v. Malesko*, No. 00-860, __ U.S. __ (November 27, 2001) (for re-examination of the panel's premise that equitable restitution of citizens' own property = damages at law), and in light of (ii) the grant of certiorari in *Lapides v. Bd. of Regents of Univ. of Georgia*, No. 01-298 (granted October 29, 2001). This Court's decision in *Lapides* will involve the "clear statement rule" and a re–examination of *Ford Motor Co. v. Dept. of Treas. (Ind.)*, 323 U.S. 459 (1945) (a state corporate tax case). Ultimately *Lapides* will involve attention to the fundamental matter of the judicial power of the United States.

Petitioners have also requested a review of the "clear statement rule" in this case, as applied to state statutory enactments. Pet. for Cert., No. 01-624, ii, 11-12, 14-15, 27-28. Much of the same ground is involved.

I. *Correctional Services Corporation* v. *Malesko*, No. 00-860, __ U.S. __, Decided November 27, 2001, Illustrates the Distinction Between the Concept of Implied Tort "Damages" Which Might be Awarded in an Action at Law, and the Equitable Remedy of Ministerial Reassessment Sought Here in a "Suit in Equity" Against State Officials Under 42 U.S.C. § 1983. The Panel's Decision Below Clearly Does Not Recognize This Fundamental Difference (Pet. App. A, 7a, *et seq.*), and Under Supreme Court Rule 10(c) it Should be Elaborated by the Court.

Correctional Services Corporation v. Malesko, *supra*, deals with the matter of an "implied" (and tort-based) damages remedy for personal injury, and at the same time clearly states that

". . . injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." (Rehnquist, C. J.). The reciprocal principle, presented by the petition herein in Questions 2 and 3, is simply that the distinct "suit in equity" granted in 42 U.S.C. § 1983 will lie against the relevant state officials with the object of securing an equitable order to effect a reassessment of valid Kansas income taxes, if the relevant levying statutes (K.S.A. § 79-32, 110(a)) (Pet. App. D, 22a-26a), are struck. An order for remedial accounting work to be done in the future is not the same as damages at law, chastising a Kansas prison guard.

The reassessment remedy sought herein would not impose "asymmetrical liability costs" on Kansas, in tort, but would result in perfectly symmetrical restitution or credit of the invalid amounts of the relevant levies, which came from petitioners' own funds, dollar for dollar. *See* Rehnquist, C. J., in *Correctional Services Corporation v. Malesko*, *supra*. Constitutional practice has long recognized a distinction between refunds of illegally collected sums, and "damages." Pet. for Cert., 12-14, 21 n.7. So has Congress. Cf., I.R.C. § 7423, 26 U.S.C. § 7423 (which originates in the days of the federal officer suit). Below, the panel did not. This is a matter for review under Supreme Court Rule 10(c).

Petitioners' fundamental problem, also distinguished in *Correctional Services Corporation v. Malesko*, *supra*, is simply that whereas Malesko had a tort remedy elsewhere, petitioners do not.

Kansas has collected the challenged levies from several hundred thousand single citizens wholesale, under a mass self-assessment and return filing system, but now insists on a retail case by case administrative review procedure for credit or refund. Dean v. Kansas, 250 Kan. 417, 826 P.2d 1373 (1992) (where the systematic statewide problem was indeed a mass levy of incorrect *rates*, not any question of discrete individual taxpayer car values). This state remedial regime is not viable,

plain, efficient, clear or effective, where a mass facial challenge is involved, on fundamental rights grounds. The problem is "hostile state invasion" via the levying statutes themselves, not the citizens, and not any administrative matter of citizen by citizen income determinations. The individual returns are already filed and refunds may be ordered by a court. K.S.A. § 79-32,105(c), Pet. App. 21a.

II. This Court Granted Certiorari in *Lapides* v. *Bd. of Regents of Univ. of Georgia*, No. 01-298, on October 29, 2001, Which Essentially Involves a Question of "Waiver by Conduct" on the Part of the Georgia Attorney General Under the Clear Statement Rule. The Instant Case Involves Kansas Legislative Consent via Statutory "Construction" Under the Same Rule.

Petitioners' fourth Question is simply whether an ambiguous state statute (enacted in 1933) providing for a "suit" (K.S.A. § 79-3230(d)), Pet. App. 20a, is to be construed to recognize a due process remedy in federal court (a "suit in equity"), where later evolved state doctrine in fact currently imposes a "clear statement" of practical citizen disremediation, under a state regime of administrative claims multiplicity. This is a problem (implicating Kansas legislative intent) requiring clarification here, under Supreme Court Rule 10(c). *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*, involved no such problem. Pet. for Cert., 11.

Thus, the inquiry here is, what courts and defendants did the Kansas legislature intend in 1933, when it enacted § 3230(d)? Manipulative conduct (as in *Lapides*) by a state Attorney General is not the problem, but the "clear statement rule" is. § 3230(d) doesn't in fact specify either a defendant or a court, or anyone's "capacity." It does not address the problem of a facial challenge to a mass levying statute, or the problem of mass equity if the levying statute is struck. The result of the panel's opinion below is that it is a dead letter. Petitioners argue that § 3230(d) means no more and no less than a simple declaration that timeless due

process principles mandate an effective judicial remedy, somewhere. Thus construed, K.S.A. § 79-3230(d) is "state of the art" for 1933 or 2001.

Both this case and *Lapides* involve the same underlying question of the judicial power of the United States. Petitioners urge that the relevant "background principle" of statutory construction is the federal constitutional due process mandate of effective state citizen access to judicial remedies in constitutional cases. Thus, in the instant case: "*It is not to be implied* from the statute in question *that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended.*" *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 256 (1905) (italics supplied). Here, Kansas now purports to recognize "no suit" anywhere on original jurisdiction to correct mass constitutional repugnance and inequity. *Dean v. Kansas*, *supra*.

As in *Lapides*, the issue is whether the panel has gone too far with *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*. It is a matter for this Court to decide, under Supreme Court Rule 10(c). Cf., *Burrill v. Locomobile Co.*, 258 U.S. 34, 38-9 (1922) (Holmes, J.) (where a "clear statement" of attempted state citizen disremediation would have raised the question whether the state actually intended to "impair substantive constitutional rights"); *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968).

CONCLUSION

The reassessment remedy sought by petitioners, which is equitable, is not like the tort-based damages remedy for personal bodily injury declined in *Correctional Services Corporation v. Malesko*, *supra*. The instant case provides the Court with an opportunity to explain the distinction in the two remedies in the context of the "suit in equity" cognizable in federal court under 42 U.S.C. § 1983. Restitution is utterly symmetrical with the

deprivation or taking, *ab initio*, accomplished under a void state levy (or pain or penalty).

The panel's decision below diverges, in that its explicit *ratio decidendi* is that restitution = damages. Pet. App. 7a, 10a. This Court should address the problem under Supreme Court Rule 10(c). This Court has never held that there is a "special sovereignty interest" in keeping the proceeds of a void state levy. The panel's ipse dixit that a forum exists (Pet. App., 11a) does not solve the question of the citizen remedies actually available in that forum. *See Dean v. Kansas*, *supra*.

If *Lapides* involves manipulative state conduct, the tandem question posed here involves interpretation of an ambiguous state statute, in the context of a "multiplicitous" state administrative regime which disremediates Kansas citizens at large. See *Dean v. Kansas*, *supra*. This Court can decide whether such practical disremediation is a constructionally proper result, under remedial principles found in the due process clause of the Fourteenth Amendment, or whether preclusive doctrine under the Eleventh should apply.

If the Court sees fit, it could reverse and remand to the Court of Appeals for reconsideration of the questions raised, in light of *Correctional Services Corporation v. Malesko*, *supra*, and in light of this Court's ultimate decision after the reconsideration of *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*, implicated in *Lapides v. Bd. of Regents of Univ. of Georgia*, *supra*. Otherwise, petitioners pray that the writ be granted.

Respectfully Submitted,

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